UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DOUGLAS EMMETT MANAGEMENT, LLC

Employer

and **Cases 31-RM-264415**

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 501-AFL-CIO

Union

EMPLOYER'S OPPOSITION TO REQUEST FOR REVIEW

Pursuant to Section 102.67(f) of the Rules and Regulations of the National Labor Relations Board ("NLRB"), Douglas Emmett Management, LLC ("Employer" or "Douglas Emmett") files this Opposition to Request for Review. As demonstrated in the Regional Director's January 28, 2021 Decision Disposing of Objections and Determinative Challenges (the "RD's Decision") and herein, none of the objections or challenges advanced by the International Union of Operating Engineers, Local 501 ("Union") possess merit. Accordingly, Respondent respectfully requests that the Board deny the Union's Request for Review ("RFR") in its entirety.

I. General Factual and Procedural Background

The Employer owns and operates approximately 18 million square feet of office space and 3,320 apartment units in Los Angeles County. These properties include locations in Woodland Hills, California. Engineers at the properties perform maintenance functions throughout the facilities. Approximately 18 engineers work in the Woodland Hills bargaining unit. On September

5, 2017, in Case No. 31-RC-203314, the Region certified the Union as the representative of that unit. The parties engaged in first contract bargaining following certification, but did not reach a first contract agreement.

In early April 2020, the Employer received evidence of loss of majority support from the Woodland Hills bargaining unit, and on April 7, 2020 filed an RM Petition in Case No. 31-RM-258900. The Employer later withdrew the Petition on August 6, 2020, and re-filed on August 10, 2020 in Case No. 31-RM-264415 (the instant case).

The Union refused to stipulate to an election, but also failed to timely file a pre-hearing Statement of Position on the Employer. As a result, on September 10, 2020, the Region found the Union precluded from raising the issues identified in its Statement of Position (including the transfers complained of in its RFR here), and directed a mail ballot election to occur between September 25, 2020 and October 16, 2020, with an October 20, 2020 ballot count.

The Regional Director's Decision and Direction of Election noted:

> The Union argues that preclusion in the instant case will allow the Employer to prevail on the issues raised by its Statement of Position and that this contradicts the Board's obligation and duty to enforce the policies of the Act. I disagree. While a procedural rule will at times prevent a substantive issue from being addressed, that is not an unintended consequence of a preclusion rule, but the intent. Sections 102.63(b)(2) and 102.66(d) of the Board's Rules are clear in their operation, and nothing in the Union's offer of proof articulated at the hearing provides a valid basis for ignoring the preclusion dictated by the Board's Rules[.]

DDE, p. 2.

At the October 20, 2020 ballot count, the Region impounded the ballots due to the pendency of unfair labor practice charge 31-CA-265002. On December 3, 2020, after it became clear to the Region that the Union's charge lacked merit, the Region opened the ballots. The count resulted in:

6 Yes votes for the Union;

4 No votes;
5 Challenges by the Union;
3 Challenges by the Employer; and
0 Void ballots.

The Union challenged the ballots of engineers Eduardo Cardenas and Patrick Gibson on the basis of: "Not Union employee; Brought in for purpose of election." The Union further challenged the ballots of William Navaroli, Juan Rojas-Campos, and Brandon Zeek on the basis of: "Not Union employee; Brought in for purpose of election; Statutory Supervisor." The Employer challenged the ballots of John Hall, Marco Interiano, and Dorian Moreno as "Not active employee."

The Union filed objections on October 26, 2020, and on December 4, 2020 (following issuance of the Tally of Ballots), filed objections yet again. The December 4, 2020 objections are virtually identical to the Union's October 26, 2020 objections.

On January 28, 2021 the Region issued the RD's Decision challenged by the Union here. The Decision overruled all challenges[1] and the Union's objections. The Union then filed its Request for Review on February 12, 2021 (later re-filed to conform to the Board's Rules).

II. To the Extent They Can Be Discerned, the Union's Objections and Challenges Lack Any Cognizable Basis in Fact or Law.

A. Identification of the Union's Objections and Challenges

Because the Union's Request for Review fails to articulate clearly the issues it raises, a review of the underlying objections and challenges may assist in discerning the questions before the Board.

[1] The Employer has not requested review of the decision to overrule its three challenges.

First, as noted above, all five of the Union's challenges state, "Not Union employee; Brought in for purpose of election." In addition, for its challenges to employees William Navaroli, Brandon Zeek, and Juan Rojas-Campos, the Union adds, "Statutory Supervisor." Meanwhile, the Union's objections state:

> **Objection 1:** The Employer did not maintain laboratory conditions for the election by transferring two employees from a non-union shop into the bargaining unit with the purpose of defeating majority support.
>
> **Objection 2:** The Employer transferred the two employees into the bargaining unit and created new senior positions for them and paid them at much higher rates than the others in the bargaining unit. The Union asserts that the promotions with pay raises were an inducement to vote against the Union and were sufficiently valuable and desirable, which resulted in the election process being materially altered.
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> **Objection 3:** The Employer did not disclose the creation of the new positions or transfers and thereby deprived the Union with opportunity to bargain on the existing employees' behalf for the promotional opportunities.
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> **Objection 4:** The Employer has provided employees with pay raises after the decertification petition, which may work as an incentive to not support the Union.

These objections and challenges distill down to only two distinct issues. First, the Union appears to allege the Employer engaged in objectionable conduct by transferring the five employees subject to its challenges into the bargaining unit, that those employees are somehow ineligible to vote, and that their wage rates evince an intent to influence the election. This issue covers the "Not Union employee; Brought in for purpose of election" claim common to all five challenges and, it appears, each of the Union's four objections.

Nonetheless, the Union's objections pose several unanswerable questions. It is unclear why Objection 1 refers to only "two employees," but the Employer assumes for purposes of this Opposition that the Union attempts to contest the transfers of all five employees subject to its challenges. Moreover, the Union's apparent contention in Objection 3 that the Employer did not notify it of the transfers vastly deviates from the facts (and its own arguments in the RFR) because,

as discussed in further detail below, the Union received such notification on multiple occasions, through multiple means. Similarly, the Employer knows of no "pay raises" to which the Union could refer in Objection 4, and its RFR provides no further explanation. For purposes of this Opposition, the Employer assumes such "pay raises" refer to the Union's contentions regarding the pay rates with which those employees transferred into Woodland Hills.

Notwithstanding these ambiguities, it appears the only other issue raised by the Union's objections and challenges is its claim that employees Navaroli, Rojas-Campos, and Zeek possess supervisory status. None of the Union's objections raise supervisory status, but its challenges seek to have those three employees' ballots set aside.

The Union's RFR also raises a number of matters lacking any relevance whatsoever to the two issues covered by its objections and challenges. For example, the first five pages of its 25-page RFR describe alleged Section 8(a)(1) statements purportedly made *during the Union's 2017 organizing campaign*. The RFR then devotes another six pages to complaints about annual wage increases and bonuses (dismissed by an Administrative Law Judge in Case Nos. 31-CA-206052 and 31-CA-211448 because the increases and bonuses were merely the fruits of the parties' bargaining over annually recurring discretionary issues), and about the discharge of former employee Juan Avina (dismissed by the Region and appeal denied in Case No. 31-CA-258353).

None of the Union's arguments on the first eleven pages of its RFR provide any support whatsoever to the Union's objections and challenges here. Consequently, the Board should disregard those arguments as irrelevant. This Opposition will address only the two issues – transfers and supervisory status - raised in the Union's objections and challenges.

B. The Union is Barred from Challenging the Transfers of Employees Cardenas, Gibson, Navaroli, Rojas-Campos, and Zeek into Woodland Hills.

1. Factual Background of Transfers

For many years, dating long before the Union's certification, the Employer has maintained a past practice of transferring employees amongst facilities to address operational needs. In late 2019 and early 2020, the Employer experienced significant manpower challenges at its Woodland Hills facilities due to attrition and multiple employees going on medical leave. Indeed, the Union complained about these staffing issues during bargaining.

Consequently, in January 2020, the Employer transferred engineers Eduardo Cardenas, Patrick Gibson, William Navaroli, Juan Rojas-Campos, and Brandon Zeek into the Woodland Hills facilities. The Employer explicitly notified the Union of these engineers' transfers and continuing wage rates at the time. Specifically, on January 9, 2020, the Union requested information regarding transfers in Woodland Hills, and the Employer responded approximately two weeks later with personnel files and other information. The Employer further identified the engineers as having transferred into the unit, attached a list of unit employees reflecting their inclusion, and provided their wages rates. Then, on March 27 and April 1, 2020, the Union requested confirmation of the permanent status of the transfers, and the Employer provided such confirmation.

At no point, other than in these proceedings, did the Union object to the inclusion of Eduardo Cardenas, Patrick Gibson, William Navaroli, Juan Rojas-Campos, and Brandon Zeek in the bargaining unit, nor did it request further discussion with the Employer regarding their inclusions or transfers. In Case No. 31-CA-258802, the General Counsel rejected the Union's unilateral change allegations regarding purportedly "new" job positions, transfers, and pay rates

for transfers. The Region dismissed those allegations on June 25, 2020, and on October 30, 2020, the Office of Appeals denied the Union's appeal.

2. *Texas Meat Packers*, 130 NLRB 279 (1961) and Critical Period Standards Preclude the Union's Objections and Challenges.

As explained above, the Union's objections and challenges regarding transfers raise the same issues rejected as unilateral change allegations in Case No. 31-CA-258802. Moreover, to the extent the Union raises any unilateral change allegations not covered by that charge, it cannot now file such a charge due to Section 10(b) of the Act. In addition to its notification to the Union more than six months ago of these engineers' transfers, pay rates, and positions, the Employer listed their identities and positions in Attachment B to its Statement of Position in Case No. 31-RM-258900, filed April 7, 2020.

In the absence of a Complaint, the Board will not consider such unfair labor practice issues in objections or challenge proceedings. Thus, if the General Counsel has dismissed an unfair labor practice allegation with respect to conduct that is also alleged as objectionable conduct, the Board will defer to the General Counsel's dismissal where "the conduct which is alleged to have interfered with the election could only be held to be such interference upon an initial finding that an unfair labor practice was committed." *Texas Meat Packers*, 130 NLRB 279, 280 (1961). Similarly, the Board will not inquire into an objection where "the gravamen of this contention is an unfair labor practice requiring a finding that the Employer's conduct constituted a violation[.]" *Id*. at 279. Such a finding in a Representation case "would conflict with the statutory scheme which vests the General Counsel with final authority as to the issuance of complaints based upon unfair labor practice charges and the prosecution thereof." *Id*. *See also McLean Roofing Co.*, 276 NLRB 839, 830 fn. 1 (1985); *Virginia Concrete Corp.*, 338 NLRB 1182, 1185 (2003) (applying these principles to Section 8(a)(5) issues).

Similarly, the RD's Decision properly finds that all of the Union's objections pertain to conduct occurring outside the critical period. Decision at pp. 3-4. The RFR criticizes the RD's Decision for this conclusion, claiming the Board should measure the critical period from the filing of the original petition – 31-RM-258900 – on April 7, 2020. The RD's Decision, however, correctly notes that Board precedent in *R. Dakin & Co.*, 191 NLRB 343 (1971), enf. denied 477 F.2d 492 (9th Cir. 1973) and *Carson International, Inc.*, 259 NLRB 1073 (1982) requires consideration of only the critical period for the petition on file.[2] Moreover, *even if* the Board measures the critical period here from April 7, 2020, the challenged January 2020 transfers fall well outside the critical period.

The Union also attempts to evade *Texas Meat Packers* and critical period standards by nebulously claiming the transfers somehow interfered with laboratory conditions. However, it does not, and cannot, explain *how* the transfers interfered with laboratory conditions. If the transfers were not unlawful unilateral changes, then nothing prevented the Employer from assigning them to the Woodland Hills facilities. Surely the Union cannot claim these employees, who worked in the bargaining unit for many months prior to the petition and the election, somehow possessed no right to vote in the Board election. Absent other unlawful conduct, no Board law supports the Union's "[b]rought in for purpose of election" theory of objections and challenges.

[2] The RFR at p. 15 appears to suggest *Carson International* recognizes an exception where a petition is withdrawn and immediately re-filed. *Carson International* does no such thing. The Board in that case recognized the Regional Director attempted to apply such an exception, and *explicitly rejected* application of any such exception. *Id*. at 1074 (discussing *R. Dakin & Co*. and stating, "[t]he contention was made that where a number of petitions are filed seriatim, the cutoff date for consideration of objectionable conduct should be the date of the filing of the initial petition. The Board rejected this contention[.]").

Furthermore, the Union cites no evidence the Employer knew how any of the transferred employees felt about the Union prior to the transfers, nor any evidence that the Employer offered inducements to undermine the Union. Indeed, the wage rates pointed to by the Union simply reflect the rates those employees brought into the unit from elsewhere. The Union offers no reason to believe those rates resulted from anything other than the employees' experience levels, skills, and abilities.[3]

Moreover, the wage rates do not support any inference of nefarious objectives. In 2020 the highest-ranking of the challenged employees, Chief Operating Engineer Navaroli and Lead Operating Engineer Zeek, earned $49.00/hour and $41.95/hour, respectively. These rates were lower than the $56.29/hour earned by incumbent Chief Operating Engineer Cary Johnson.[4] Meanwhile, Cardenas, Gibson, and Campos-Rojas earned only $21.63/hour, $21.16/hour, and $19.57/hour, respectively. Other than those three engineers, only three other bargaining unit employees earned less than $24.00/hour in 2020.

For all of these reasons, the Union cannot now challenge the transfers of the employees subject to its objections and challenges, nor any of the circumstances surrounding those transfers.[5]

[3] To the extent wage rates elsewhere may have generally exceeded those paid to bargaining unit employees, such lower unit rates would reflect only the fruits of bargaining with the Union over annual wage increases since its certification. As the Administrative Law Judge noted in 31-CA-206052 and 31-CA-211448, Board law requires the Employer to implement the results of such bargaining.

[4] The other incumbent Chief Operating Engineer, John Hall, was out on medical leave for the entirety of 2020.

[5] The Board may also find the Union precluded from litigating both the transfers and the supervisory status issue discussed below because, as the Regional Director found, its failure to timely serve a pre-hearing Statement of Position on the Employer results in such preclusion under Rules 102.63(b)(2) and 102.66(d).

C. Employees Navaroli, Rojas-Campos, and Zeek are Not Supervisors under Section 2(11) of the Act.

As an initial matter, it appears the Union's inclusion of Rojas-Campos as a supervisory challenge was in error. Rojas-Campos works as a utility engineer, and within the bargaining unit only three apprentice engineers hold lower-ranking positions.

Additionally, Lead Operating Engineer Zeek holds a lower-ranking position than Chief Operating Engineer Navaroli, and possesses no authority Chief Operating Engineers do not also possess. As a result, if Chief Operating Engineers are not supervisors under Section 2(11) of the Act,[6] then Lead Operating Engineer Zeek is *a fortiori* not a Section 2(11) supervisor.

The Union's 2017 stipulations regarding the Woodland Hills unit warrant note. The election in Case No. 31-RC-203314 occurred pursuant to a Stipulated Election Agreement. In that Agreement, the parties agreed to a unit description of:

> Included: All full-time engineers and preventative maintenance engineers employed by the Employer at: 6300 Canoga Ave., Woodland Hills, CA; 6320 Canoga Ave., Woodland Hills, CA; 21300 Victory Blvd., Woodland Hills, CA; 21550 Oxnard St., Woodland Hills, CA; 21600 Oxnard St., Woodland Hills, CA; 21650 Oxnard St., Woodland Hills, CA; 21700 Oxnard St., Woodland Hills, CA; and 21800 Oxnard St., Woodland Hills, CA.
>
> Excluded: All other employees, janitorial employees, porters, office clerical employees, guards, and supervisors as defined in the Act, as amended.

The unit description includes "all" engineers, including Chief Operating Engineers. Accordingly, the parties have treated Chief Operating Engineers as included in the unit ever since certification. The Union also stipulated the unit excludes "supervisors as defined in the Act, as amended." Thus, by now arguing a Chief Operating Engineer is a supervisor under Section 2(11)

[6] The Employer notes the Union did not object to the ballots of Chief Operating Engineers John Hall or Cary Johnson.

of the Act, the Union contradicts is prior stipulation, as well as the entire course of the parties' conduct during the past three years.

The Board also previously addressed the supervisory status of the Employer's Chief Operating Engineers in Case No. 31-RC-217994, a petition involving engineers in Encino, California. Chief Operating Engineers in Encino perform the same duties, and possess the same authorities, as those in Woodland Hills. The duties and authorities applicable to the Chief Operating Engineer position have not changed in either location since that time.[7]

In 31-RC-217994, the Union sought to exclude Chief Engineers as supervisors under Section 2(11) of the Act. The Region rejected the Union's contentions in its May 17, 2018 Decision and Direction of Election ("DDE"), including its specific contentions that Chief Engineers possess the authority to assign, reward, discipline, and/or responsibility direct work using independent judgment in the interest of the Employer. The Board, in an unpublished Order dated August 24, 2018, denied the Union's Request for Review of the Region's DDE.

Here, just as in 31-RC-217994, Chief Engineers including Navaroli do not possess the authority to perform any Section 2(11) functions using independent judgment in the interest of the Employer. The Employer knows of no evidence to the contrary, and the RFR cites only a single incident in which Navaroli purportedly instructed an employee to take his break. This claim falls far short of establishing any of the Section 2(11) supervisory indicia.

Accordingly, as the RD's Decision notes, the Region recently found Navaroli is not a Section 2(11) supervisor in Case Nos. 31-CA-265002 (dismissed on November 25, 2020; the Union did not appeal) and 31-CA-264999 (dismissed on December 9, 2020; appeal denied on

[7] Coincidentally, at the time of the 31-RC-217994 proceedings, Navaroli worked in the Encino bargaining unit.

January 27, 2021). These determinations result in the same preclusive effect under *Texas Meat Packers* as that which dooms the Union's contentions regarding transfers.

As a result, the Board must reject the Union's claims regarding supervisory status for Navaroli, Zeek, and Rojas-Campos.

III. Conclusion

For all of the reasons stated above, as well as the reasons articulated in the RD's Decision, the Union's objections and challenges must be overruled. As a result, Respondent respectfully requests that the Board deny the RFR, affirm the RD's Decision, and direct the Region to open and count all challenged ballots.

Respectfully submitted this 19th day of February, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19the day of February 2021, this **OPPOSITION TO REQUEST FOR REVIEW** was filed electronically and service copies sent via electronic mail to:

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